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Price Gouging, Non-Worseness, and Distributive Justice

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Abstract
This paper develops my position on the ethics of price gouging in response to Jeremy Snyder's article, "What's the Matter with Price Gouging." First, it explains how the "nonworseness claim" supports the moral permissibility of price gouging, even if it does not show that price gougers are morally virtuous agents. Second, it argues that questions about price gouging and distributive justice must be answered in light of the relevant possible institutional alternatives, and that Snyder's proposed alternatives to price gouging fare worse on the dimension of justice than a system in which goods are allocated by a system of market prices.

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Price gouging, Exploitation, Distributive justice

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Price gouging tends to evoke from humane and decent people an immediate and overwhelming sense of repugnance.[1] Most people have a strong sense that price gouging involves a kind of predatory behavior – a ruthless satisfaction of individual greed at the expense of the vulnerable – and that it must therefore constitute a serious moral wrong. Indeed, recent research in moral psychology suggests that this kind of "gut" reaction against price gouging might be very deeply rooted in us indeed. Instinctive and powerful reactions against the exploitation of the vulnerable may have served our early ancestors well by promoting the cohesion and survival of the small groups in which they lived.[2] But while reliance on automatic emotional reactions might have worked well for our primitive ancestors, such reactions are of little help in coming to a sophisticated and subtle understanding of the many and varied questions bearing on the morality of price gouging.[3] For such an understanding requires us to do more than simply decide whether "price gouging" is "good" or "bad." It requires us to discriminate among the many forms price gouging can take – between, for instance, an established merchant's raising prices to cover increased costs of supplies and risk, and a low-level entrepreneur who is drawn by the lure of high profits to begin selling items for the first time in the wake of a disaster. And it requires us to discriminate between the many different kinds of moral evaluations we can make of price gouging – whether it ought to be morally permissible or impermissible; whether it is morally praiseworthy, morally blameworthy, or merely morally tolerable; whether we have good moral reasons to prohibit it by law or by social pressure; and so forth. Each of these questions in turn raises a host of differing and difficult subsidiary questions that require both careful empirical research and thoughtful philosophical analysis to fully address.

Fortunately, Jeremy Snyder's paper on the subject contains no shortage of precisely this sort of thoughtful analysis.[4] Although his conclusions differ in some ways from my own,[5] he

[1] For a discussion of the role of repugnance as a reaction to price gouging and other forms of market exchange, see (Roth, 2007, pp. 43-44)

[2] For an overview of the possible evolutionary origins of "deontic" moral intuitions, such as those which tend to be invoked against the permissibility of mutually beneficial exploitation, see (Greene, 2007; Haidt, 2001; Prinz, 2008)

[3] They may also be less helpful in a world in which distant, impersonal relationships have replaced close-knit societies as the locus of interpersonal interaction, and in which the distant indirect and non-obvious effects of our actions have an increasingly great relative causal significance on human well-being as the direct and visible ones. On this point, see Hayek's discussion of the extended order in (Hayek & Bartley III, 1988, pp., chapter 1), but also the concluding sections of (Greene, 2007).

[4] (Snyder, 2009)

[5] See (Zwolinski, 2008). See also (Zwolinski, forthcoming, 2009).

nevertheless provides a carefully argued case for the immorality of price gouging, while at the same time demonstrating an admirable sensitivity to the many morally attractive features of a free-market price system. Still, in spite of its many strengths, there are some points at which Snyder's position is less clear or less well-defended than it might be. Rather than continuing to sing the praises of what is generally a very fine piece of work, then, I shall focus my comments on what I take to be two problematic areas of his paper – first, Snyder's rejection of the non-worseness claim appears to be based on a misunderstanding of the kind of moral objects to which that principle is meant to apply; and second, Snyder's appeal to considerations of distributive justice and equal respect for persons is flawed insofar as it rests on two false assumptions – that price gouging undermines equitable access to vital goods, and that a regime in which price gouging is banned promotes equitable access. I will conclude with some brief comments on how Snyder's evaluation of price gouging compares with my own.

1. The Non-Worseness Claim

One of Snyder's major objections to my argument stems from my use of the "nonworseness claim" (NWC) to defend price gouging against the charge that it is wrongfully exploitative. NWC, as I described it, holds that "in cases where *A* has a right not to transact with *B,* and where transacting with *B* is not worse for *B* than not transacting with *B* at all, then it cannot be seriously wrong for *A* to engage in this transaction, even if its terms are judged to be unfair by some external standard" (Zwolinski, 2008, p. 357). If the NWC is true, then it is hard to see how standard cases of price gouging can be serious moral wrongs. After all, most of us would think that an individual who could sell generators to victims of a disaster but chose not to do so would be acting within his rights (even if we also believe that she would be acting less than fully virtuously), and it also seems clear (Snyder himself concedes this (Snyder, 2009, pp. 6-7)) that those who buy from price gougers at inflated prices are nevertheless better off as a result than they would have been had the transaction not taken place at all. So, since gouging someone is better for them than neglecting them, and we have a moral right to neglect them, must we not therefore have a moral right to gouge them as well? How could gouging possibly be worse than neglect?

Snyder takes issue with this argument by holding that it fails when "motivations are assessed through sets of actions rather than single, morally ambiguous actions" (Snyder, 2009, p. 26). Price gougers might indeed be acting in ways that help their customers, Snyder concedes, but they might be doing so only out of the vicious motive to extract as much profit as possible out of people in desperate need. Of course, they *might* be doing it out of a sense of morally virtuous beneficence as well. We can't tell just by looking at one action in isolation. To determine whether a person is properly motivated by a responsiveness to the needs of others, we need to look at their pattern of action as a whole, and not just one isolated instance.

This reasoning seems correct, as far as it goes. But it is not clear what lesson Snyder thinks he can draw from it. At times, Snyder writes as though he is making a point about the *moral character* of the price gouger and what it takes to lead a "morally praiseworthy life" (Snyder, 2009, p. 24). With this point I am in full agreement – indeed it is one which I tried to make myself in part five of my paper (Zwolinski, 2008, pp. 366-368). One's moral character is a matter of one's general disposition to see the needs of others as reason-giving and to respond appropriately to those reasons. And the act of price gouging is too morally ambiguous for us to read this disposition off of it. But NWC is not a thesis about moral character, it is a thesis about the wrongness of moral *acts*. And this is importantly different. Vicious people can perform morally permissible actions. Think, for instance, of Kant's shopkeeper who returns the correct change to a naïve customer *only* out of a selfish concern for his own reputation and long-term profit. If he could be sure he could steal a penny from a child's change and get away with it, he would, but prudence dictates restraint. Such a person has a bad moral character. But the act he is performing – giving the child back her correct change – is perfectly innocent. The distinction between these two moral assessments becomes clear, and especially important to recognize, when we think about their respective implications for third parties. If we see a vicious person performing a morally *impermissible* action then, all else being equal, we should try to stop him, either as individuals or perhaps through the collective institutions of the state. But there is no comparable reason for us to try to stop someone from doing that which it is morally permissible for her to do, even if the person doing it is morally vicious. Her moral viciousness might give us *other* kinds of reason for action. We might have reason to censure her and get her to see the intrinsic value of all persons. And, in the case of Kant's shopkeeper, we might be very hesitant to patronize her store for fear that circumstances in the future will *not* always tip the scales of self-interest toward the side of honesty. But we do not have reason to interfere with her performance of a morally permissible act, or even to morally condemn the act, though we might have reason to morally condemn the agent.

Thus, Snyder's concerns about NWC do not give us reason to prohibit price gouging, or even condemn it. For all his arguments show (correctly, I think) is that price gouging can sometimes be done by morally vicious people. They do not show that the act of price gouging itself is morally impermissible. And that is all that my use of NWC was ever meant to deny.

2. Distributive Justice

One of the most common criticisms of price gouging, and one which is central to Snyder's argument as I understand it, is that it leads to vital resources being distributed in a morally objectionable way. Because price gouging involves charging a higher than normal price for goods, it disadvantages those who are poor relative to those who are well-off. According to Snyder, price gouging thus undermines equitable access to essential goods, and thereby manifests a lack of equal respect for persons (Snyder, 2009, p. 11).

However, the claim that price gouging undermines equitable access to goods is problematic for two reasons. First, it is the *emergency* that undermines equitable access, not whatever price gouging may occur in response to that disaster. Prior to the emergency, there is generally a well-functioning market in food, water, and other vital goods that generally ensures that all who need these goods will be able to purchase them. Emergencies lead to either a sharp increase in the demand for, or a sharp decrease in the supply of, these goods, and it is *this fact* that undermines equitable access. When supply and demand are radically altered so that there are not enough goods to go around, *no* method of distribution will produce equitable access – at least not at levels sufficient to meet people's needs.[6] Some people will get the goods, and others will not.

This is true of all methods of distribution, including Snyder's proposed method involving legislatively-imposed caps on both the price of essential goods and on the amount of those goods that any consumer can purchase. Such a method of distribution, Snyder says, "mimic[s] a lottery for essential goods, treating all persons as equally deserving of the goods essential to basic human functioning" (Snyder, 2009, p. 23). But the lottery metaphor, while apt in its characterization of a system of this sort, is puzzling as a way of highlighting the alleged distributive justice of such a system. For a lottery has seemed to many – most memorably to John Rawls – the paradigm case of moral arbitrariness (Rawls, 1971, p. 74). In a lottery, some will obtain goods, some will not, and the difference between the two is nothing more than brute luck. In Snyder's lottery-like system, people will likewise be divided into "Haves" and "Have-Nots," and the difference between them will be based on who manages to get in line before supplies run out. This may not be *entirely* a matter of luck – perhaps it gives an edge to the perceptive, or those with a lot of time on their hands to stand in line. But it can hardly be said to be a system that distributes in accordance with any characteristic of great moral significance.

Furthermore, the sense in which it can be said to be a system that treats people as "equals" is at best a highly attenuated one. Because the context in which such a system operates is one where demand greatly exceeds supply, it is highly unlikely that the result of such a system will be equal units of vital goods being distributed to each person. For non-divisible goods like generators and radios, there will simply be no alternative to some people getting the good while others go away empty-handed. Other goods like ice could theoretically be divided into equally-sized units for each person. But such a proposal is rife with practical difficulties. What if the portions of the good, once equally divided, are too small to be of any practical use? A bag of 300 ice cubes equally divided among 300 people is almost infinitely less useful than the same bag of ice in one person's hands. How is the relevant 'community' among which equal distribution is to take place to be defined? How are shopkeepers to determine what an equal unit of the good should be? And, most significantly, what sort of restrictions are to be put on the use to which people's shares of the good may be put? Will people be allowed to sell their goods to others – even though this would be certain to undermine equitable access?[7] Or will such secondary markets be prohibited?

The only kind of equality that Snyder's system can hope to achieve, then, is equality of *opportunity* to access vital goods. But this too, on closer examination, turns out to be less satisfying from a moral perspective than we might have hoped for. For in reality, opportunity under Snyder's proposed system will *not* be equal. Even if the system runs perfectly, those who show up first to a vendor will have a better opportunity than those who show up later. And in reality, rationing systems like the one proposed are often subject to corruption that favors

[6] Of course, one could guarantee equity of a sort with a policy that bans distribution of the good altogether. Such a policy, if effectively enforced, could result in each person getting an equitable share of nothing.

[7] Here we face a problem similar to that illustrated by Robert Nozick's famous Wilt Chamberlain example (Nozick, 1974, pp. 160-164). The maintenance of an initially equal distribution will require either a prohibition on trades or continual redistribution. And since Snyder's proposal is not to initially distribute *all* resources equally, but only to provide equal access to certain vital resources, the difficulty of maintaining equality will be even greater.

'insiders' – those with a personal, religious, ethnic, or other connection to those with resources or the power to affect their distribution.[8] It is true that nothing in Snyder's proposed system directly makes access to vital goods contingent on wealth, so with respect to *that* variable opportunity may be said to be equal. But in reality, and with respect to other equally if not more arbitrary variables, opportunity will not be equal.

Finally, it is worth noting that while Snyder's proposed distributive mechanism seeks to mimic while improving upon the *allocative* function of prices, it makes *no* effort to mimic their equally if not more important *signaling* function.[9] Prices that increase and decline in response to changes in supply and demand are important not only to allocate scarce resources among competing uses, but to signal when too much or too little social resources are being invested in a particular activity. In particular, the high prices that vital goods like water, sandbags, and hotel rooms command in the wake of a disaster signal to entrepreneurs to provide *more* of these goods, and indicate that larger-than-normal profits can be made by doing so. Post-disaster high prices thus convey both the *information* that increased supply is needed, and the *incentive* to provide that additional supply. But in so doing, high prices provide their own best corrective – as profit-seeking entrepreneurs rush to reap the windfall profits that the radically altered balance of supply and demand makes possible, they increase supply and in doing so drive the price down to something approximating its pre-disaster equilibrium. This means that the window of opportunity during which price gouging can occur is narrow, *but only if individuals are free to set prices as they see fit.*

This point is crucial. No one, not even those of us who argue that price gouging is morally permissible, thinks that price gouging is unqualifiedly *good* in the sense of being something that would occur in an ideal world. Cases of price gouging occur in circumstances of desperate need and terrible suffering. And in the short run, price gouging is just one more allocative mechanism among others, with the result that some people's needs – often the needs of the poorest and most vulnerable – will go unmet. But policies and moral injunctions that prevent prices from rising freely in the wake of a disaster do not diminish the desperation of the short-run; they simply make it harder to move past that short run into a period of recovery. This might not be the case if we could rely on all people to act on the principles of beneficence that Snyder enjoins. And indeed, one of the most heartening aspects of some of the recent natural disasters in the United States has been the extent to which beneficence *has* been effective in delivering vital goods and services to those who so desperately need them. But it is probably a permanent feature of the human condition that there will always be less beneficence to go around than is needed. And in such a condition we would do well to take as much advantage as we can of the market's ability to channel individual self-interest toward socially desirable ends. In some cases, as is demonstrated in the response of Wal-Mart and Home Depot to Hurricane Katrina, even narrow self-interest will not lead to price gouging, and this is a happy result.[10] But where it does, we should recognize that gouging ought to be tolerated not as an

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[8] See, for a discussion, (Alchian & Allen, 1968, pp. 95-99).

[9] On this distinction, see (Zwolinski, 2008, pp. 360-364).

[10] Steven Horowitz has documented the response of the private sector to Hurricane Katrina, noting that in the two weeks following the disaster Wal-Mart shipped over 2500 truckloads of needed goods to Louisiana, a substantial portion of which was given away free. This quick response time was made possible by Wal-Mart's elaborate

end in itself, but merely as a method of making a very bad short-run situation less bad (by conserving scarce resources and allocating them efficiently) and also of making that short-run as short as possible (by providing incentives to increase supply).

3. Conclusion

Despite the concerns raised above, Snyder's ultimate position on the morality of price gouging does not seem to be too distant from my own. We both believe that price increases in the wake of a disaster can, in some circumstances, be not only morally permissible but positively morally desirable insofar as they serve to promote the interests of those suffering in the wake of a disaster. And we both believe that under other circumstances, price gouging can be wrongfully exploitative. The main differences between our views seem to be two: we differ regarding the precise conditions under which price gouging becomes wrongfully exploitative, and we differ regarding the desirability of the legal regulation of price gouging.

On the first of these differences, Snyder's position is somewhat unclear. He states that some "price increases condemned as gouging are morally innocent at worst and, more often, create a positive and morally praiseworthy benefit for all concerned."(Snyder, 2009, p. 6) They do this, he notes, in many of the ways I discussed in my own paper: they aid "in the conservation of scarce goods by making it more likely that they will be purchased by those who place the greatest value on them,"(Snyder, 2009, p. 8) they send signals which lead "other suppliers into the market, quickly increasing supplies of essential goods,"(Snyder, 2009, p. 7) they provide an incentive to merchants to " increase supplies of essential goods prior to the [disaster],"(Snyder, 2009, p. 8) and they serve as a "fair reward for the efforts and risks undertaken by vendors"(Snyder, 2009, p. 8). And Snyder seems to indicate that insofar as price increases are necessary to serve these morally praiseworthy goals, they are morally permissible, as when he writes that "price increases even beyond those justified by increased costs and risks can be justified" insofar as they increase supplies, encourage rationing, and discourage waste (Snyder, 2009, p. 21).

The question this raises, then, is under what conditions price gouging *will not* be morally acceptable on Snyder's account. The only clue Snyder provides to an answer is that price increases will be unacceptable when they "undermine equitable access to certain, essential goods" (Snyder, 2009, pp. 9-10). But this is puzzling, since price increases can presumably serve the morally praiseworthy goals described above (e.g. increasing rationing, discouraging waste) while *at the same time* undermining the equitable access of individuals to those goods. Indeed, it seems likely that the only way that price increases *can* promote goals like allocative efficiency

mechanisms for tracking storms before they hit in order to ensure that its stores are well stocked prior to the time that demand increases. Neither Home Depot nor Wal-Mart engaged in price gouging in the aftermath of Katrina. And while it is possible that this restraint was at least partly motivated by altruistic concerns, no doubt a large part of it was motivated by the recognition that their behavior during this highly public and emotionally charged disaster situation would affect consumers' future willingness to give them their business. For established retailers, post-disaster deals are but one move in a long series of iterated prisoners' dilemmas with customers, and in such contexts mutual cooperation is often the strategy best in accord with individual self-interest (Axelrod, 1984). Or, as one Home Depot executive put it, "I can't think of a quicker way to lose customers than price-gouging." See (Horowitz, 2008, 2009).

and signaling new supply is by undermining equitable access, since these price increases will operate in a context in which individuals will face dramatically different budget constraints. This suggests that we cannot hope for both equitable access and the morally attractive benefits of price increases, and it is not clear which of these Snyder's account counsels us to choose in the (possibly ubiquitous) cases of conflict.

The second difference between Snyder's account and my own is that I favor the repeal of all laws prohibiting or regulating price gouging, whereas Snyder thinks some regulation is appropriate. Here, again, it is easy to overstate the differences between our accounts. We both think, as far as I can tell, that current laws are a bad idea insofar as they prohibit many mutually beneficial exchanges that would not be objectionably exploitative. But Snyder does seem to suggest that there is some role for the legal regulation of price gouging, and that it will involve limiting permissible price increases to those necessary to promote allocative efficiency, signal new supply, and compensate for increased risk and costs to merchants (Snyder, 2009, pp. 20-21). Now, I actually think that Snyder provides a fairly exhaustive list of the morally praiseworthy aspects of price increases, such that somebody who knowingly increased her price beyond this level could properly be described as satisfying her individual greed with no morally redeeming side-effects. So as an account of the conditions under which price increases are *morally praiseworthy*, I don't have much to disagree with in Snyder's proposal. But as a proposal for the *legal regulation* of price gouging (or even the social regulation of price gouging in the forms of boycotts/social pressure), I have a serious problem with it. The problem is that by Snyder's standard, it is virtually impossible to know whether any given price increase is moral or immoral.[11] What percentage price increase is necessary to encourage the optimal level of rationing among one's consumers? In trying to answer this question, the merchant at least has the advantage of observing the behavior of her customers and seeing who responds in what way to a certain rate of price increase. But how will the merchant know who *should* be buying less, and who *should* be buying more? How would legislators now this? And what hope does a merchant or a legislator have – even if she is lucky enough to have a PhD in econometrics – of predicting the level of price increase necessary to attract sufficient supply to where it is needed?[12]

Thus, even if Snyder's list of morally relevant criteria is complete, it is useless as a standard of regulation because we cannot ever know if we are satisfying it. My contention is that the best hope we have of finding a price that approximates the satisfaction of these criteria is to let that price emerge through the free choices of numerous individuals in the market. This, too, is an imperfect mechanism, since actual prices do not always and necessarily reflect a proper balance of supply and demand, nor do they even purport to approximate "fair rewards" for risk and effort. Market prices, in other words, are not a perfect measure of moral significance. My claim, though, is that given the constraints in knowledge faced by those who would be charged with

[11] The problem is that no individual or group of individuals has sufficient information to know what price would be necessary to satisfy the criteria Snyder sets out. This problem is essentially just a specific instance of the more general knowledge problem discussed by Friedrich Hayek in (Hayek, 1937, 1945) and elsewhere.

[12] There is strong evidence that even well-trained economists are severely limited in their ability to predict how actual markets will respond to events like a change in the general price level, much less a change in the price charged by one particular merchant. See, for a discussion, (G. Gaus, forthcoming; G. F. Gaus, 2007).

regulating prices, reliance on market prices in post-disaster contexts does a better job at promoting our moral values than any feasible alternative mechanism.

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